

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
THIRTIETH REGION**

**URS ENERGY AND CONSTRUCTION, INC.**

**AND**

**Case 30-CA-18775**

**TIMOTHY PARE, AN INDIVIDUAL**

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**GENERAL COUNSEL'S ANSWERING BRIEF  
TO EXCEPTIONS**

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## TABLE OF CONTENTS

	<u>Page(s)</u>
<b>I. Introduction.....</b>	<b>1</b>
<b>II. Statement of Facts</b>	
<b>A. Background .....</b>	<b>4</b>
<b>B. May 12 Membership Meeting .....</b>	<b>4</b>
<b>C. Lewis Yuker's Statements About Pare's Charges.....</b>	<b>5</b>
<b>D. Pare's Crane to Go Off- Rent .....</b>	<b>8</b>
<b>E. Yuker's Hostility Toward Pare Resurfaces .....</b>	<b>9</b>
<b>F. Yuker's Decision to Lay Off Pare.....</b>	<b>11</b>
<b>III. Analysis.....</b>	<b>12</b>
<b>A. The ALJ correctly credited Pare over Yuker regarding critical         conversations that led up to Yuker's discriminatory decision to         lay Pare off.....</b>	<b>12</b>
<b>B. The ALJ correctly found that there was a causal connection between         Pare's protected activities and Yuker's decision to lay him off.....</b>	<b>21</b>
<b>C. The ALJ correctly concluded that URS failed to establish that it would         have laid Pare off regardless of his protected activities..</b>	<b>25</b>
<b>IV. Conclusion .....</b>	<b>30</b>

## TABLE OF CASES

	<u>Page(s)</u>
<i>Galesburg Construction</i> , 267 NLRB 551 (1983) .....	20
<i>Hillside Ave Pharmacy, Inc.</i> , 265 NLRB 1613 (1982) .....	14
<i>Laser Tool, Inc.</i> , 320 NLRB 105 (1995) .....	14
<i>Mr. Z's Food Mart</i> , 325 NLRB 871, 888-889 (1998) .....	14
<i>Meskar Door</i> , 357 NLRB No. 59, (2011) .....	21
<i>Standard Drywall Products</i> , 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951).	18
<i>Teddi of California</i> , 338 NLRB 1032 (2003) .....	20
<i>WEBCO Industries, Inc.</i> , 340 NLRB 10 (2003) .....	31
<i>Wright Line</i> , 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1 <sup>st</sup> Cir. 1981), cert. denied 455 U.S. 989 (1982) .....	21

Andrew S. Gollin, Counsel for the Acting General Counsel, respectfully submits this Answering Brief to Exceptions filed by URS Energy and Construction, Inc. ("URS").

## I. INTRODUCTION<sup>1</sup>

On July 28, 2011, the Honorable Associate Chief Administrative Law Judge William N. Cates ("ALJ") correctly found that URS discriminatorily laid off Timothy Pare on October 1, 2010 in retaliation for his protected concerted and union activities, in violation of Section 8(a)(1) and (3) of the Act. Pare's protected activities began in February 2010,<sup>2</sup> when he began to question how his union, the International Union of Operating Engineers, Local 139 ("Local 139" or "Union"), was operating its referral service. Pare believed that Local 139's primary dispatcher, Guy Yuker, was exercising favoritism when deciding who to refer out for work. On March 12, Pare and two other members filed unfair labor practice charges against Local 139, alleging the Union was operating its referral service in a discriminatory, arbitrary, and bad faith manner. Local 139 responded by ostracizing Pare and the others for filing their charges. At a May 12 union meeting, Local 139 business manager, Terrance McGowan, threatened Pare and the others with sanctions and possible expulsion for violating the Union's bylaws which prohibited members from filing Board charges without first exhausting the Union's internal complaint procedures.

At the time of this meeting, Pare was working for URS as a crane oiler at a project in Oak Creek, Wisconsin. Pare's foreman on the project was Lewis Yuker, Jr., a long-

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<sup>1</sup> General Counsel's Exhibits will be referred to as (G.C. Exh. \_\_\_\_), and rejected General Counsel's Exhibits will be referred to as (Rej. G.C. Exh. \_\_\_\_); URS's Exhibits will be referred to as (R. Exh. \_\_\_\_), and rejected URS Exhibits will be referred to as (Rej. R. Exh. \_\_\_\_). Transcript citations will be referred to by page number and line number as (Tr. \_\_\_\_:\_\_\_\_), unless the Transcript cite covers multiple pages. The ALJ's decision will be referred to as (ALJD \_\_\_\_).

<sup>2</sup> All dates are 2010, unless otherwise stated.

standing member and former business agent of Local 139, and the brother of Local 139 dispatcher, Guy Yuker. The day after the May 12 meeting, Lewis Yuker told employees that Pare and the others who filed the charges against Local 139 had one opportunity to withdraw them, or they would lose their Union cards. In the days, weeks, and months that followed, Lewis Yuker repeatedly tried to pressure Pare into withdrawing the charges he had filed against Local 139. Pare, however, did not bend to the pressure.

For a short period of time, beginning in around August, Yuker largely ignored Pare. That continued until late September, when Yuker's animosity toward Pare resurfaced. This occurred shortly after an oiler was nearly killed after he fell asleep inside the swing radius of his crane. Following the incident, Pare and the other oilers were concerned as to whether they would be able to continue working inside the swing radius of their cranes. Pare spoke to the head steward on the project, Art Flores, who told Pare that oilers could continue to work inside the swing radius when necessary, as long as their operators knew where they were. However, on September 24, Lewis Yuker told Pare and some of the other oilers that they would not be allowed to be inside the swing radius while their cranes were running. Pare told Yuker what Flores had told him. Yuker became irate at Pare, stating that he did not care what the steward had told him, that he was Pare's foreman, and that Pare needed to do what he said. Pare stated he just wanted Yuker to be aware of what Flores was saying in case Flores told other oilers the same thing. Yuker left and came back later that day. When Yuker returned, Pare asked him why he was always so angry with him, and why it always seemed like they were "trying to shoot each other in the head all the time." Yuker leaned forward, pointed his finger at

Pare, and said, "What you've done to the Union, you've done to me. Until you change that, this is the way it's going to be."

A week after this confrontation, Lewis Yuker made the decision to lay Pare off from the Oak Creek project. URS asserts that Yuker selected Pare for layoff because Pare's crane was going off rent (i.e., no longer used). The evidence, however, establishes that this is nothing more than pretext. Yuker knew Pare's crane was going off rent two weeks earlier, when he told Pare that he and his operator would be staying on and reassigned to another crane. The only intervening event is the September 24 confrontation in which Yuker expressed his intense animosity toward Pare for his protected concerted activities.

The ALJ evaluated the evidence and found that URS's decision to lay off Pare violated Section 8(a)(1) and (3) of the Act. The ALJ credited Pare's testimony regarding his one-on-one conversations with Yuker and determined that Yuker's motivation for laying Pare off was because of issues Pare was causing for the Union and for Yuker's brother regarding the operation of the Union's hiring hall.

URS now excepts to the ALJ's decision, arguing that the ALJ erred in: (1) crediting Pare's testimony over Yuker's testimony regarding their conversations; (2) determining that there was a causal connection between Pare's protected activities and his layoff; and (3) concluding that URS failed to prove that it would have laid Pare off regardless of his protected activities. For the reasons set forth below, there is no merit to any of URS's exceptions. The Board, therefore, should adopt the ALJ's findings and conclusions, and issue an appropriate remedial order, providing for reinstatement,

backpay, and interest for Pare, as well as requiring URS to post a notice to employees regarding its unlawful conduct.<sup>3</sup>

## **II. STATEMENT OF FACTS**

### **A. Background**

Like many members of Local 139, Pare relies upon the Union's referral service to get work. (Tr. 29-30). Guy Yuker is the person responsible for referring individuals out for work. (Tr. 30-31). In early 2010, Pare and others began having concerns about how Local 139 was operating the referral service and whether Yuker was playing favorites when deciding who to refer out for jobs. (Tr. 31). On February 22, Pare requested information from Local 139 to help determine if Yuker was operating the referral service fairly and consistently. (G.C. Exh 2). On February 24, Terry McGowan refused Pare's request and informed Pare the he would have to come to the Union hall to review any information about the Union's referral service. (G.C. Exh. 3). Thereafter, Pare went to the Union hall and spoke to Guy Yuker about his concerns. Pare told Yuker that if things did not change, he would have to go to the Labor Board to file charges. (Tr. 34-36). On March 12, Pare and two other members, Randy Huele and Fred Higgins, each filed unfair labor practice charges against Local 139 regarding the operation of its referral service. (Tr. 39-40).

### **B. May 12 Union Membership Meeting**

After filing his charge, Pare learned that he, Huele, and Higgins were being discussed at Union meetings, so he attended the Union meeting on May 12 at the Pewaukee Union hall. (Tr. 42-43). At this May 12 meeting, McGowan announced that

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<sup>3</sup> The Acting General Counsel requests that the Order provide for reimbursement for excess taxes owed and appropriate backpay reporting to the Social Security Administration.

the three members had broken their oaths and the Union's bylaws by filing charges without first exhausting the Union's internal complaint procedures. (Tr. 44-46). McGowan stated the Union already had spent in excess of \$20,000 defending against the charges, and warned that if the charges were found to have merit, it could cost the Union and its members millions. Specifically, McGowan stated the charges could cost the members their upcoming scheduled wage increases. (Tr. 46). McGowan's statements upset several members. Some stated the three should be brought up on charges and lose their Union cards and pensions. Others threatened Pare with physical violence (e.g., shooting out his tires, running his truck off the road, blowing him up, etc.). (Tr. 47-50).

**C. Lewis Yuker's Statements About Pare's Charges**

At the time of this May 12 Union meeting, Pare was working for URS as an oiler on an older 4100W Manitowoc Crane at the Oak Creek project. (Tr. 50-52). Pare's supervisor at the Oak Creek project was Lewis Yuker, Jr., a long-standing, active member and former business agent of Local 139, and the brother of current Local 139 dispatcher, Guy Yuker. (Tr. 122-123). In defense of the Union and his brother, Lewis Yuker took it upon himself to pressure Pare into withdrawing his charges. It is undisputed that the day after the May 12 membership meeting, Lewis Yuker told employees during a morning meeting that Pare and the others had one opportunity to withdraw their charges, or they would lose their Union cards. (Tr. 149-150)(McKeag); (Tr. 125-126)(Yuker). Lewis Yuker did not believe Pare deserved to be working on a Union job after what he had done. A day or so later, Yuker directly confronted Pare on the jobsite and told him one-on-one that he "shouldn't have filed the charges against the Union." (Tr. 55-56). Pare did not respond.



A few weeks later, on June 9, both Pare and Lewis Yuker attended the Union's June monthly membership meeting in Pewaukee. (Tr. 59-60). A week before this meeting, Pare filed a second unfair labor practice charge against Local 139 in Case 30-CB-5569 over the threatening statements that were made about him and the others. (G.C. Exh. 5). During this June 9 meeting, Lewis Yuker got up and asked Terry McGowan about the status of Pare's charges with the Labor Board. [Yuker did not specify whether he was referring to Pare's original charge from March 12 or his second charge filed on June 2.] McGowan did not directly answer the question but, instead, told Yuker that members should wait and see what the Board did with the charges before pursuing internal Union charges against Pare and the others. (Tr. 60-61). Both before and after this Union meeting, Lewis Yuker refused to greet Pare or shake his hand. (Tr. 61). The following day, on June 10, Pare was working with operator, Mark Tomaro. Toward the end of the day, Lewis Yuker drove out to their crane in his four-wheeler to talk. During the conversation, Pare asked Yuker why he had refused to shake his hand the night before at the Union meeting. Yuker responded, "I'm not going to shake [your hand] until we know what the outcome of the charges are. You guys broke your oath to the Union. You broke the bylaws by going outside the Union. You were wrong for what you did." (Tr. 62-63). Pare did not say anything in response.

About two weeks later, on June 28, Pare was again out working with fellow operator, Mark Tomaro, near the Spang Farm lay-down yard when Lewis Yuker drove out in his four-wheeler to see them. (Tr. 63-64). Yuker crossed through the crane's swing radius and climbed up onto the crane to give Pare and Tomaro a copy of a Seventh Circuit Court of Appeals decision involving a lawsuit filed against Local 139 by another

member, Franklin C. Edmonds, concerning the Union's obligation to provide its members with certain information relating to its referral service. (Tr. 64-65) (G.C. Exh. 6). [Yuker testified that he received a copy of the decision from Local 139 Business Agent, Steve Buffalo, who told Yuker to pass it out to members on the jobsite. (Tr. 127-128).] When Yuker gave Pare a copy of the decision, he told Pare the decision was evidence that Pare and the others could not sue the Union, and that it was wrong of them to be doing it. (Tr. 65:13-15). Pare responded to Yuker that it was none of his business. Pare then got off the crane to go and finish up his job duties. (Tr. 65). URS does not dispute that Yuker gave Pare a copy of the decision. (Tr. 128).

About two weeks later, on around July 12, Lewis Yuker again came out to see Pare. Yuker handed Pare an article from Local 139's newsletter written by the Union's attorney, Brian Hlavin, about the bylaw requirement that members exhaust the Union's internal complaint procedure before filing outside charges. Yuker told Pare "This might be of particular interest to you." (Tr. 66-67) (G.C. Exh 7). Yuker then walked away chuckling. Pare did not say anything in response. (Tr. 66-67). URS does not dispute Yuker gave Pare the newsletter article. (Tr. 129).

Two days later, on July 14, Lewis Yuker once again came out to where Pare was working and asked his operator, Mark Tomaro, if he (Yuker) could take Pare over to help oil on another crane. (Tr. 68-69). Tomaro agreed, and Pare got his things and got into Yuker's four-wheeler. As Yuker and Pare drove over to the other crane, Yuker proceeded to tell Pare why he had given him the article from the Union's attorney. Yuker told Pare that he should read the article, that it says that Pare had no right to go outside the Union for help, and that he and the others had broken the bylaws by going outside the

Union to file their charges with the NLRB. Yuker further stated to Pare that he (Pare) should take the article and show it to his (Pare's) attorneys so that they understood that Pare could not sue the Union, and that he was wrong for doing it. (Tr. 68-69). Pare could no longer hold his tongue. He responded by telling Yuker, "Look ...[t]his [is] got no business with you. You're my foreman. This is between me and the Union. I come to work. I am not late. I don't take off. I am not insubordinate. When you put me on other pieces of equipment, I go and I run the other pieces of equipment. I don't have any complaints when I run other pieces of equipment for the people that I run them for ... This just didn't have anything to do with you, Lew, and it's none of your business. It shouldn't be on this jobsite." (Tr. 69-70). Yuker said nothing in response.

On July 27, Pare amended his charge in Case 30-CB-5569, adding an allegation about the above Union bylaw requirement. After filing (and likely because of) this amended charge, Yuker had little interaction with Pare for several weeks.

**D. Pare's Crane to Go Off-Rent**

On August 3, Mark Tomaro told Pare that the 4100W Manitowoc Crane they were working on was going to go "off rent." (Tr. 72-73). This meant that the crane was no longer going to be used. The Boilermakers confirmed that they also had been told that Pare's crane was going to go off rent. Shortly thereafter, in mid-August, Yuker transferred Tomaro to another crane, and he assigned another operator, Jason Klatt, to work with Pare on the 4100W Manitowoc Crane. Klatt and Pare worked together on the crane for the next month and a half. (Tr. 73).

On September 16, Lewis Yuker drove out in his four-wheeler to visit Klatt and Pare while they were in the middle of a pick and carry out by Spang Farm. (Tr. 73-74).

Yuker went up to speak to Klatt in the crane cab, and then he came down to talk to Pare. He told Pare that he (Pare) was doing a nice job. He also told Pare, "Hey. Look. The crane is going to go off rent. I was told to keep my two best men. You and Jason are them two guys. I don't want you telling any of the other [Local] 139 guys out here. Keep it to yourself because I'm going to have to lay somebody else off to keep you guys on, but that's my game plan." (Tr. 74-75). Considering their recent history, Pare was understandably stunned by this news, and it is still not entirely clear whether Yuker meant it when he told Pare that he wanted to keep him at the project.

#### **E. Yuker's Hostility Toward Pare Resurfaces**

In late August and again in mid September, there were two oilers at the Oak Creek jobsite who engaged in unsafe conduct while working inside the swing radius barriers of their respective cranes. One of the oilers (Dave Struely) fell asleep on his crane and was nearly killed. He was terminated for the offense on around August 31. (G.C. Exh 19). The other (Fredrick Heller) was caught smoking near flammable materials. He was terminated for the offense on around September 22. (G.C. Exh. 20). URS requested that Local 139 refer out replacements for both of these terminated oilers. According to the Craft Employee Requisition Forms, URS requested a replacement for Struely on around September 10, and Local 139 referred out James Kadlec on September 13. (G.C. Exh. 11:9). It is not clear from the Craft Employee Requisition Form when exactly URS requested a replacement for Heller, but Local 139 referred out Marcus Bohn on September 27. (G.C. Exh. 11:10). Another oiler, William Larson, was disciplined with a written warning on September 2, after he was caught writing personal checks while working inside the swing radius barrier of his crane. (G.C. Exh. 18).

Following the Struely situation, there was concern among Pare and the other oilers about whether oilers would be allowed to continue working inside the swing radius barriers of their cranes. Pare, in particular, was concerned because he regularly had to work inside the swing radius barrier of his 4100W Manitowoc Crane because of the crane's age and need for constant adjustments and repairs. (Tr. 75-76). Pare spoke to other oilers about this issue. (Tr. 77). He also spoke to the bull or chief steward on the project, Art Flores, about whether or not oilers would be allowed to continue working inside the swing radius barriers of their cranes. (Tr. 76-77). Flores told Pare that oilers would be allowed to continue working inside the swing radius barrier, provided the operator knows the oiler is there and the oiler has a particular reason for being inside the swing radius barrier. This conversation occurred on September 16. (Tr. 77).

About a week later, on September 24, Lewis Yuker came out to where Pare and Klatt were working and explained to them URS's new rules prohibiting oilers from being inside the crane's swing radius barrier. Yuker told them that they could not go inside the swing barrier at any time the crane engine was running. (Tr. 78-79). Pare responded by telling Yuker what Flores had told him. Yuker became agitated and reminded Pare that he was his foreman, that Flores was not, and that Pare had to listen to him (Yuker). Pare responded that he was just trying to let Yuker know what Flores was saying so that Flores was not telling others something wrong. That was the end of the conversation, and Yuker left. Yuker returned about 15-20 minutes later, while Pare was talking to another oiler, Frank McCauley. (Tr. 79-80). Yuker pulled up in his four-wheeler, got out, and told McCauley about the new rules. Pare excused himself and backed off to let Yuker talk to McCauley. When Yuker finished explaining the new rules, Pare asked him if he had a

minute to talk. Yuker simply looked at him. McCauley walked away. Pare asked Yuker why there was so much animosity between the two of them. Pare said that every time the two of them talked it felt like they "wanted to shoot each other in the head." Pare told Yuker, "Lew, I've got nothing against you. You're my foreman. I treat you like a foreman. I never give you any grief. Why is it like that?" (Tr. 80:20-22). Yuker then sat up in his seat, pointed his finger at Pare, and said, "What you've done to the Union, you've done to me. Until you change that, this is the way it's going to be." (Tr. 80-81). Pare said nothing in response.

**F. Yuker's Decision to Lay Off Pare**

A week later, on October 1, Pare was laid off from the Oak Creek project. There is no dispute that Lewis Yuker was the one responsible for selecting Pare for lay off. Bob McKeag, a temporary foreman who filled in for Yuker when he was not on the jobsite, notified Pare that he was being laid off. McKeag told Pare that it was Yuker's decision to lay him off, and McKeag did not want Pare to hold it against him (McKeag). (Tr. 81-82)(G.C. Exh. 9). After McKeag notified Pare that he was being laid off, Pare went and spoke to Alan Corder, who handled Human Resources for URS. Corder told Pare that URS did not decide who got laid off; they merely decided the number of craft employees who needed to be laid off. Corder confirmed that it was Lewis Yuker who made the decision to lay Pare off. (Tr. 82-83).

### III. ANALYSIS

**A. The ALJ correctly credited Pare over Yuker regarding critical conversations that led up to Yuker's discriminatory decision to lay Pare off.**

URS claims that the ALJ erred in crediting Pare over Yuker concerning critical conversations that occurred on September 16 and September 24. As the record reflects, and the ALJ found, Pare had a clear, detailed recollection of these conversations. He testified in response to open-ended questions, without referring to any notes or other documents. He did not paraphrase or summarize, and he did not attempt to embellish or exaggerate. He testified truthfully, consistently, and thoroughly about what was said, covering how the conversations began, how they evolved, and how they ended. In addition, Pare was able to describe the manner in which it was all said, including copying Yuker's mannerisms as he testified (e.g., sitting upright, pointing his finger as he spoke, raising his voice to express his irritation with what Pare did and was continuing to do). (Tr. 78-81). When probed on cross-examination, Pare's testimony remained consistent and always responsive to the questions. (Tr. 103-104).

The same cannot be said of Lewis Yuker. With regards to the September 24 conversation, Yuker testified as follows:

- Q: Do you recall having a conversation with Mr. Pare on the 24th of September?  
A: Yes, sir.  
...  
Q: Do you remember what time of day it was that you first spoke with the crane that Mr. Pare was assigned on, the 4100?  
A: I don't remember what time of day it was. I know I was there twice.  
Q: Okay. Do you know who was there when you first spoke to Mr. Pare?  
A: The first conversation, I believe it was just Tim Pare and Jason Klatt. Yeah, I think at that time Jason was on that crane.

Q: Okay. So Jason has been assigned to that crane. So what -- would you please explain what happened in that conversation? What did you say and what did anyone who was part of that conversation -- say?

A: I went around and I explained that, you know, that they needed to be, you know, follow the rules about staying out of the swing radius. Tim brought up an issue that he had been told other things by the -- he said by the steward. And then I informed him -- I don't know if it was when I was there the first time or the second time, but in somewhere in there I informed him that I was his direct supervisor and that he was to follow my instruction. And he was overbearing with me at that point.

Q: What do you mean, he was overbearing?

A: Overbearing is as in forcing the conversation on me. I'm not sure how to explain it any better than that. Had -- he had to have his say in all of these things. And that's the best way I can describe it.

Q: Now, you said there were two conversations that day. Is that right?

A: Yes.

Q: So the second one was after, obviously.

A: Right

Q: What happened--why were you there again?

A: I went back, and Frank McCauley was over the area of that crane, so I stopped to talk to Frank to tell him the same thing: "Dude, stay out of the swing radius." And when I was there, then Tim came and talked to me again --

Q: What did Tim say?

A: -- about the previous conversation. Then he had to tell me why he was going on and being so forceful in the first conversation. And I know by the end of the conversation I was pretty annoyed with it. Again, he was overbearing and --

Q: So how did you finish the conversation, or how was the conversation ended?

A: He said he had some questions or something. And I asked him if I had answered all of his questions, he said, "Yes," and I told him to go find something to do.

Q: At any time, on either of the conversations you had with Mr. Pare on the 24th of September, was there ever any discussion about his charges against the Union or his internal complaints with the Union?

A: No, sir; absolutely not.

Q: Are you certain?

A: Absolutely not. There was no discussion of that. Strictly swing radius.

(Tr. 201-203).



As the above demonstrates, and as the ALJ correctly found, Yuker had poor or incomplete recollection of these conversations.<sup>4</sup> He testified primarily based upon his opinions or impressions of what was said, as opposed to what actually was said, using terms such as “overbearing” or “forceful” to describe Pare, and “annoyed” to describe himself.<sup>5</sup> As for the critical end to the second conversation, Yuker gave nothing more than specific denials to leading questions. The Board routinely has held that specific denials of this sort are not credible evidence. See e.g., *Mr. Z’s Food Mart*, 325 NLRB 871, 888-889 (1998) (“These denials, which for the most part were simple ‘yes’ or ‘no’ answers to a series of very suggestive, leading questions posed to them by [r]espondent’s counsel, often without so much as a pretense that the witness’ independent recollection had been exhausted, are in my view entitled to little or no weight.”); *Laser Tool, Inc.*, 320 NLRB 105, 109 (1995) (“The essentially bare denial that events occur or that any specific statements were made is not a persuasive or helpful aid to an evaluation of credibility.”); *Hillside Ave Pharmacy, Inc.*, 265 NLRB 1613, 1616 (1982) (“... denial was a summary one, given in response to a leading question and is thus entitled to little weight.”).

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<sup>4</sup> There were other instances in which Yuker had poor or incomplete recollection. For example, with regards to the Union newsletter and the Seventh Circuit Court of Appeals decision, Yuker could not confidently recall who at the jobsite he gave them to, in addition to Pare, calling into doubt whether he was informing everyone, or targeting Pare.

<sup>5</sup> One interesting aspect of Yuker’s testimony is his loaded statement that Pare “had to have his say in all of these things.” There is no evidence of any other situation in which Pare allegedly tried to “have his say” regarding anything at the jobsite. The only “things” that Pare arguably “had to have his say in” were how Local 139 was operating its referral service, but those statements did not occur on the jobsite. It was Yuker who continually brought up the topic with Pare in trying to get him to withdraw the charges. It was only after months of Yuker’s continued harassment that Pare told him, in July, that it had to stop. This portion of Yuker’s testimony is telling because it demonstrates how Yuker blurred or conflated Pare’s protected activities with his actions on the jobsite.

The second conversation at issue is the September exchange between Pare and Yuker in which Yuker notified Pare that his 4100W Manitowoc Crane was going off rent and that he intended to keep Pare and his operator, Jason Klatt, working on the job on some other crane. The conflict with this particular conversation was not so much over what was said but over when it was said. Pare testified the conversation occurred on September 16. Yuker testified it occurred on around September 29. As stated above, Pare testified truthfully, consistently, and thoroughly about each of the conversations he had with Yuker, always including the time, date, and location of each of their conversations. Yuker, on the other hand, had limited memory of events or conversations, and frequently was unable to articulate his recollection with much, if any, detail. These same observations hold true regarding this particular conversation. Yuker testified he believed that he learned that the 4100W Manitowoc Crane was going off rent early in the week of September 26. He then testified he thought he spoke to Pare and Klatt in the middle of the week about keeping them on, he thought about laying off another retiree oiler (Jim Kadlec) in order to keep Pare, he then "slept on it" and changed his mind about laying off the retiree oiler (Kadlec) because "it was not right", and then, at some point, he spoke to his boss (Duane Stienmetz) about keeping Klatt but said nothing about keeping Pare. (Tr. 180-183).

There are several issues with Yuker's version. First, Pare testified that he originally learned on August 3 from his operator, Mark Tomaro, that their crane was going to go off rent, and that was confirmed by the Boilermakers shortly thereafter. (Tr. 72-73). Yuker claims he heard that their crane was going off rent in late September, but that he had heard rumors about it for about a month. It is highly unlikely that employees

would know before their general foreman that a piece of equipment was going to go off rent. Of course, what Pare was hearing also could have been rumors, and the decision may not have been finalized until mid-September. The fact, however, that the crane ended up staying on the jobsite indicates that there was not the same level of urgency or secrecy that typically occurs when a piece of equipment actually goes off rent and leaves the jobsite. Second, there is nothing in the record that corroborates Yuker's version of events. While the same could be said of Pare's testimony, the difference is that URS is a business that regularly documents these types of decisions and events with records, emails, notes, etc. For example, URS introduced one document, an Out-Shipment Report, dated October 5, 2010, stating that the crane was going off rent as of October 1 but was going to stay on-site for awhile. (URS Exh. 25). But it did not introduce any other documents. There are no documents confirming when the decision was first made to have the crane go off-rent, or any documents reflecting when Yuker spoke to Pare or Klatt about initially wanting to keep them on. [In the Rejected Exhibit file, there are copies of Yuker's notes about conversations he had with Pare, and none of those notes corroborate his testimony as to when he talked to Pare about his crane going off rent. Interestingly, this conversation is the only conversation for which URS did not attempt to introduce Yuker's notes.] Where URS and Yuker appear to document everything, it is not plausible there is no documentation that could, if true, corroborate Yuker's testimony.

Similarly, URS failed to present any witness that corroborated Yuker's testimony about the timing of the decision and his conversation with Pare. Yuker testified that he had a conversation with his boss, Duane Stienmetz, at around this time about the crane

going off rent and who Yuker wanted to keep. URS did not call Stienmetz to the stand to testify about his recollection about any of this.

The ALJ credited Pare over Yuker regarding their September 16 and September 24 conversations. The ALJ held as follows:

I note there are two factual disputes between Pare's and General Foreman Yuker's testimony that are very significant. The first involves when Yuker learned the crane Pare worked on was going "off rent" and notified Pare, while the other concerns what was said between Pare and Yuker during their second exchange on September 24, 2010. Pare impressed me as testifying fully, accurately, and truthfully. I credit his testimony and will expand further on my credibility resolutions as I summarize the facts relied upon. I note Pare recounted with detail the events of both September 16 and 24. He explained precisely what he was doing at the time Yuker approached him, and remembered specifically the conversations that ensued. Yuker, on the other hand, could not recall exactly when he told Pare he intended to keep Klatt and Pare on site. Perhaps Yuker's most telling testimony, however, is his recollection of his conversations with Pare on September 24. Regarding their first conversation, Yuker said Pare was "overbearing . . . as in forcing the conversation on me. I'm not sure how to explain it better than that . . . he had to have his say in all of these things. And that's the best way I can describe it." Yuker then testified about their second conversation that "[Pare] had to tell me why he was going on and being so forceful in the first conversation. And I know by the end of the conversation I was pretty annoyed with it. Again, he was overbearing." This testimony is disjointed and does not elaborate in detail what Pare said or why it made Yuker so irritated. Yuker provides no substance or specificity to what ensued during their conversations other than his own foggy recollection and perceptions of the encounter. Furthermore, Yuker still harbors animus against Pare for filing charges against Local 139 which may impact his ability or willingness to recall their conversations fully or accurately.

(ALJ 10-11).

In its exceptions, URS argues that the ALJ erred in crediting Pare over Yuker, finding that Pare had better recall and could testify more specifically about the content of these conversations. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant

evidence convinces the Board that those resolutions are incorrect. *Standard Drywall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). For the reasons stated above, the ALJ's credibility resolutions are sound and clearly supported by the record, and there is no basis for reversing those resolutions.

URS's primary argument for why Pare's testimony was more detailed than Yuker's testimony is because Pare had more at stake and more reason to misrepresent what was said during his conversations with Yuker. A review of the record in this case undermines such an argument. There is no dispute that Yuker repeatedly used and abused his position as the foreman on the jobsite to harass Pare about filing his charges against the Union, and it was that use and abuse that led to his employer being held liable for his actions. If anyone had a strong self-interest in selectively remembering (and forgetting) details of these conversations, it was Yuker. Yuker knew that his misconduct in this case could cost his employer tens of thousands of dollars, and possibly impact his continued employment with URS. As a result, there is no merit to the argument that the ALJ erred in crediting Pare over Yuker.

URS also argues that the ALJ erred in "ignoring evidence that undermines Pare's credibility." To begin with, URS claims that the ALJ erred in failing to consider the fact that when Pare previously was laid off from the Oak Creek project in 2009, Pare claimed that layoff was because of his Union activity. In 2009, the Union referred Pare out to the Oak Creek project to replace Yuker's wife who went out on medical leave. She returned and URS laid Pare off. Pare believed that the Union knew that the assignment was going to be short, and assigned him to the job (without telling him that it was going to be a short assignment), in retaliation for the fact that Pare's brother had run against the current

Union administration earlier in the year. While Pare suspected this, and raised the issue with URS at the time he was laid off in 2009, he did not pursue the matter. Pare, instead, chose to gather information from the Union regarding the operation of its hiring hall to determine if the Union was operating its hiring hall in a fair and consistent manner. As stated previously, Pare received certain information which led him and others to file Board charges against the Union. It was those charges that Pare filed that drew the ire of Yuker, and caused Yuker to retaliate against Pare in October 2010. The ALJ, however, viewed all of this evidence as too remote, and not relevant to deciding the case. The ALJ correctly concluded that there was sufficient evidence of events occurring in 2010 to substantiate finding a violation.

URS also argues that the ALJ failed to draw an adverse inference based upon the fact that the Acting General Counsel failed to call Frank McCauley to testify about his recollection of the conversation between Pare and Yuker on around September 24, in which Yuker explained to Pare why he had so much animosity against him. McCauley was not called because, as Pare testified, he (McCauley) walked away after Yuker told him the new swing radius rule, but before Pare asked Yuker why he was so angry with him. As such, McCauley was not present when Yuker explained the reason for his animosity toward Pare for what he had done regarding the Union. If URS disputed Pare's recollection, and believed McCauley was present for the entire conversation, it certainly could have called McCauley to testify about his recollection.

Finally, URS argues that the ALJ erred in failing to give sufficient weight to the testimony of Robert McKeag, who was the acting foreman that informed Pare that Yuker had decided to lay him off. McKeag testified that he recalled Pare telling him that Yuker

had told him “a couple of days prior” that he was going to try to keep him (Pare) on the job, which URS claims corroborates Yuker’s version of the chain of events. Assuming McKeag was correct, and Pare stated this, that testimony was hardly specific enough to corroborate Yuker’s version. If URS wanted to corroborate Yuker’s version of events, it could have introduced documentary evidence regarding the timing of the decision, or called other witnesses to do the same. Yuker testified that he had a conversation with his boss, Duane Stienmetz, in late September about the crane going off rent and who Yuker wanted to keep. URS did not call Stienmetz to the stand to testify about his recollection about any of this. An adverse inference should be drawn against URS because of its failure to introduce such testimony or documentation into the record. See *Teddi of California*, 338 NLRB 1032, 1040 (2003) (adverse inference appropriate where employer's witnesses testified to timing of decision to layoff alleged discriminatee, but employer failed to introduce documentary evidence that “surely ... must have existed” regarding that timing); *Galesburg Construction*, 267 NLRB 551, 552 (1983) (employer's failure to produce documents in its control that were vital to prove its defense justified inference that those records did not support the employer's position).

Additionally, when McKeag told Pare that Yuker had decided to lay him off, McKeag could not explain to Pare the reason why. If the reason was because the crane was going off rent, McKeag would have explained that to Pare. But McKeag did not say that to Pare. He simply said he did not know why.

URS has presented no valid reason for why the ALJ’s credibility determinations should be reversed. The ALJ evaluated each of the witnesses and their testimony and

provided his rationale for crediting Pare over all other witnesses about these critical conversations. The ALJ's credibility determinations, therefore, should be affirmed.

**B. The ALJ correctly found that there was a causal connection between Pare's protected activities and Yuker's decision to lay him off.<sup>6</sup>**

The ALJ held as follows regarding the causal connection between Yuker's animosity toward Pare for engaging in protected activities and Yuker's decision to lay Pare off:

Was Pare's protected activity a substantial or motivating factor in the Company's decision to lay him off on October 1, 2010? The totality of the circumstances clearly establishes it was. First, General Foreman Yuker was a long time union member and former business agent for the Union. Yuker was displeased Pare filed unfair labor practice charges with the Board against the Union where his brother, Guy Yuker, was the general dispatcher and other close relatives were members. General Foreman Yuker even announced to the employees at the worksite that those (Pare and the other two) should be given a chance to undo what they had done by filing charges with the Board, but, if they did not, internal union charges should be brought against them and their union cards taken away. General Foreman Yuker made it clear that Pare and the others were to drop, or withdraw their charges, or they should be removed from union membership and its benefits including job referrals. Following Pare's filing his second unfair labor practice charge on June 2, 2010, against the Union in which he alleged he was being harassed for filing his initial charge, General Foreman Yuker attended the Union's June 9 monthly meeting and specifically asked about any disposition of the unfair labor practice charges against the Union. Pare attempted to speak with General Foreman Yuker at the June meeting but Yuker ignored him. The next day, June 10, 2010, at work, Pare asked General Foreman Yuker why he would not speak with him or shake his hand the day before. Pare credibly testified Yuker told him he was not going to shake his hand until he knew the outcome of the charges Pare had filed against the Union. Yuker told Pare he was wrong in filing the charges and going outside the Union and

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<sup>6</sup> The Employer argues the ALJ erred in finding a "causal connection" between Pare's protected activities and the decision to lay him off. The Board has held that a causal connection is not an element in establishing a *prima facie* case under *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). See, e.g., *Mesker Door*, 357 NLRB No. 59, slip op. at 2 and fn. 5 (2011) ("The elements commonly required to support a finding of discriminatory motivation are [Sec. 7] activity by the employee, employer knowledge of that activity, and . . . animus [against such activity] by the employer."). Therefore, it is immaterial whether the ALJ found a causal connection or not.



had broke his oath to the Union. General Foreman Yuker acknowledged he again refused to shake Pare's hand at the end of this meeting because he picked his friends and he disagreed with Pare's actions.

On June 28, 2010, General Foreman Yuker continued to demonstrate his animus against Pare's protected conduct by again indicating to him his charges against the Union were wrong and gave Pare a copy of a Seventh Circuit Court of Appeals decision that was "evidence" Pare and the other two should not be suing the Union. Yuker at work was again expressing his displeasure to Pare regarding Pare's protected actions. On July 12, 2010, at work, General Foreman Yuker gave Pare a union newspaper article written by the Union's attorney on the subject of how internal remedies saved Local 139 money. Yuker suggested to Pare the article might be of interest to him. Two days later Yuker, at work, explained to Pare the newspaper article showed Pare had no right to go outside the Union for help and that Pare should show it to his attorney so they could understand that what Pare was doing was wrong and he could not sue the Union. Pare told General Foreman Yuker all of this was none of Yuker's business that it was a matter between he (Pare) and the Union. General Foreman Yuker again expressed his animus against Pare's protected conduct on September 24, 2010. Yuker admittedly spoke with Pare twice on that date as he was explaining new safety procedures to those working on or around cranes. I credit Pare's account of the two meetings...One week later Pare was laid off. It is clear that General Foreman Yuker was the one responsible for selecting Pare for layoff. His selection of operators or oilers for layoff was consistently upheld by higher management. Higher management determined only the number to be laid off while Yuker selected the specific individuals for layoff.

By all of the above, the Government has established the Company, General Foreman Yuker in particular, had and specifically expressed animus against Pare's protected conduct and acted on that animus in laying off Pare on October 1, 2010.

(ALJD 11-12).

In its exceptions, URS argues that the ALJ erred in finding a causal connection between Yuker's animosity toward Pare and Yuker's subsequent decision to lay Pare off. First, URS again argues the ALJ failed to give enough weight to McKeag's testimony that Pare told him during their October 1 conversation that Yuker had told him (Pare) "a couple days prior" that he (Yuker) may have something else for him as far as work,

which undermines Pare's testimony that the conversation occurred on September 16, before the two had their confrontation on September 24. McKeag's testimony, and the weight it should be given, is addressed in the prior section. The timing of the conversation Yuker had with Pare in which he stated Pare's crane was going off rent is important, but certainly not dispositive. As summarized above, the ALJ based his findings and conclusions on the totality of the circumstances, including all of the interactions Yuker and Pare had regarding Pare's protected activities, and he correctly decided there was ample evidence of animosity to support finding a violation in this case.

URS also claims the ALJ erred in failing to give sufficient weight to the fact that Yuker gave Pare more opportunities to earn more money operating other equipment than it offered to most other oilers. The ALJ correctly concluded that the problem with this argument is that--assuming URS offered Pare more opportunities--there is no evidence as to why it did so. (ALJD 13-14). The reality is that URS could have offered Pare more opportunities to operate this other equipment for any number of reasons. To begin with, Yuker testified that he offers this work to oilers based upon who is available. (Tr. 176). Pare could have been offered this work simply because, at the time the equipment needed to be operated, he was more available than others. Furthermore, almost all of the opportunities Pare was given to operate other equipment occurred during two short periods of time (April 16, 21, 22, 28, 30 and July 15, 16, 20, 21, 22). The first of these short periods was in April, before the May 12 meeting in which Local 139 notified Lewis Yuker and the other members that Pare had filed the charges against the Union regarding its referral service. (URS Exh. 20). These April opportunities, therefore, prove nothing regarding Yuker's animosity toward Pare concerning his protected activities.

In addition to greater availability, another reason URS could have offered these opportunities to Pare is that Pare is a highly skilled, experienced operator. According to the undisputed evidence, Pare regularly received positive reviews regarding his performance. (Tr. 88). He had no productivity issues, had no safety issues, and received no discipline. (Tr. 88)(Yuker); (Tr. 254)(Corder). It makes perfect sense that URS would want one of its best, most reliable employees to operate this other equipment.

The bottom line, though, is there is no evidence to explain exactly why URS gave Pare these opportunities to operate this other equipment. Yuker never stated he *actually intended* to offer Pare more opportunities than the other oilers. Therefore, because of these other variables and the lack of any evidence of clear intent, the fact that Pare received more opportunities to operate this other equipment is insufficient to undermine the overwhelming evidence of animus that exists in this case.

Finally, URS argues the ALJ erred in failing to give sufficient weight to Yuker's stated desire to keep Pare on the job site. URS argues that if Yuker truly wanted to get rid of Pare because of his statutorily protected activities, Yuker would have done so, and he would not have told Pare that he wanted to keep him (Pare) and Klatt on the job. There is no dispute that Yuker expressed a desire to keep Pare prior to deciding to lay him off. However, that single statement--assuming it was sincere--does not negate Yuker's repeated criticism of Pare for what Pare was doing filing charges against the Union, particularly Yuker's response to Pare on September 24 when he asked Yuker why there was so much hostility between the two of them. The overwhelming weight of the evidence establishes that Yuker had intense animosity toward Pare for his protected activities, and it was this animosity that led Yuker to lay Pare off.

**C. The ALJ correctly concluded that URS failed to establish that it would have laid Pare off regardless of his protected activities.**

URS argues that the ALJ erred in not finding that URS would have laid Pare off irrespective of his protected activities. Specifically, URS claims that Yuker's decision to lay Pare off was because Pare's crane was the one going off rent. On the surface, this may appear to be a reasonable explanation. The evidence, however, establishes that it is nothing more than pretext.

Timing and animosity are both important in establishing pretext in this case. There is no dispute that throughout much of Pare's employment, Yuker harassed Pare about filing charges against Local 139, and Yuker grew increasingly annoyed with Pare when he refused to withdraw those charges. After a while, the harassment, and Yuker's annoyance with Pare, appeared to subside. However, it all resurfaced on September 24, when Pare and Yuker had their conversations about the new swing radius rules. Yuker admitted at the hearing that the entire conversation "annoyed" him. It likely was the same sort of annoyance Yuker had when Pare filed his charges against Local 139 regarding the operation of its referral services, and then refused to withdraw those charges, despite Yuker's repeated efforts to get Pare to do so. Animus, however, does not need to be inferred in this case, because Yuker made his feelings perfectly clear on September 24, when he told Pare exactly why there was so much animosity between the two of them, stating "What you've done to the Union, you've done to me. Until you change that, this is the way it's going to be." (Tr. 80-81). A week later, Yuker made the decision to lay Pare off.

As mentioned above, Yuker told employees following the May 12 Union meeting that if Pare and the others did not withdraw their charges, they would lose their Union

cards. Yuker did not believe that Pare, after what he did, belonged on a Union job. Those feelings certainly resurfaced for Yuker on September 24. A week later, Pare's crane went off rent, providing Yuker with what, on the surface, appears to be a legitimate reason to lay him off. But a closer look at the circumstances surrounding the layoff decision reflects that it was not legitimate.

To begin with, Yuker testified that he reassigns operators or oilers whose equipment goes off rent, and that he did not reassign Pare because there was no other piece of equipment available. However, at around the time of Pare's September 24 confrontation with Yuker, URS submitted a request to Local 139 for an oiler to replace Fredrick Heller who had been laid off on around September 22. [Interestingly, the Craft Requisition Form URS submitted to Local 139 for an oiler to replace Heller is the only one that is not dated as to when the request was made. (G.C. Exh. 11:10). The document does show that the replacement, Marcus Bohn, was to report on September 27. A majority of the other Requisition Forms show that the turnaround time between the date of requisition and the referral's report date is typically around three or four days.] None of URS's witnesses offered any explanation for why--at a time when Yuker knew that Pare's crane was going to go off rent and Pare would need to be reassigned or laid off--URS requested another oiler. URS likely will argue that was because it did not know that Pare's crane was going to go off rent until September 26 or 27. Assuming this is true--even though Pare credibly testified Yuker told him on September 16 that his crane was going off rent--why didn't URS refuse Local 139's referral of Marcus Bohn and, instead, keep Pare working at the jobsite? URS made clear during the hearing that the management rights provision in the contract gives it the right to reject referrals. So why

didn't URS decide to keep Pare and refuse or reject Bohn? There is no dispute that Pare is an experienced, highly skilled operator with no productivity, safety, or disciplinary issues, who was able to operate several pieces of equipment on the Oak Creek jobsite. It makes more sense to keep him than to accept someone who may not know how to operate this other equipment, or who may not perform as well as Pare performed.

Next, at the time URS laid off Pare, it decided to keep the other operator on the crane, Jason Klatt. URS argues that it kept Klatt, and got rid of Pare, because Klatt could operate more equipment, including cranes. Assuming that this is true, Klatt did not work as an operator following Pare's layoff. Instead, he worked strictly as an oiler. Yuker testified that Klatt worked as an oiler until only recently, when he was moved to a mechanic position. (Tr. 212-213). Therefore, despite Yuker's claim that he wanted to keep Klatt because of his alleged versatility, Yuker assigned Klatt to perform the exact same work that Pare was performing before his layoff. Under the rules, Yuker could have laid Klatt off, rather than Pare, and then recalled Klatt, by name, from the Union, if he had a crane that needed to be operated. There is nothing in the record prohibiting URS from doing this. In fact, there are several examples in the record of URS requesting operators for short or temporary assignments. (G.C. Exh. 11:2, 3, 4, 5, 7, 9, and 11).

In its exceptions, URS claims the ALJ erred in failing to give sufficient weight to the fact that URS's practice is to lay off operators and oilers when their equipment goes off rent, and that it was acting in accordance with this practice when it laid Pare off. The evidence, however, does not establish that URS's uniform practice is to lay off operators

when their equipment goes off rent.<sup>7</sup> Yuker admitted that there have been exceptions to this alleged practice, and that he personally has decided to keep certain operators *and* oilers on after their cranes have gone off rent. (Tr. 117-118). Yuker testified that he subjectively determines if the employee whose equipment is going off rent has skills that may still be of use. Additionally, the reality is that URS laid off few operators and oilers from the Oak Creek project during the period of time at issue. In fact, in 2010, there

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<sup>7</sup> The ALJ held as follows regarding URS's claim that Yuker was simply following established procedure when he selected Pare for layoff:

Did the Company demonstrate that it would have laid Pare off when it did even in the absence of any protected conduct on his part? I find the Company did not meet its burden of persuasion. The Company's contention General Foreman Yuker was simply following Company protocol when he selected Pare to be laid off, as Pare was the oiler assigned to the crane going off rent, does not withstand close scrutiny. Two conversations of General Foreman Yuker with Pare establishes Yuker's authority to select those for lay off regardless of any protocol and establishes what his real motivations were in selecting Pare for lay off. In the conversation with Pare, on September 16, 2010, General Foreman Yuker clearly indicated he had the authority not to follow protocol in selecting employees for lay off. Yuker told Pare and operator Klatt that although their crane was going off rent he planned to keep them and asked Pare and Klatt not to mention that fact because he had to "lay someone else off" to keep them employed but that was his "game plan." It is clear General Foreman Yuker had a game plan for selecting employees for lay off that did not follow any protocol. It is just as clear Yuker could select whomever for layoff and his selections or recommendations to higher management were, as a general practice, accepted by higher management. The second of two conversations, on September 24, 2010, demonstrates Yuker's real motivation for selecting Pare for lay off. In the first conversation on September 24, Pare attempted to tell Yuker one of the union stewards had said something different about oilers being in the swing radius than what General Foreman Yuker had stated. The exchange between Pare and Yuker became heated. In the second conversation on September 24, Pare tries to clear up the first conversation between them. In the second conversation Pare asks Yuker why there seems to be so much animosity between them. Yuker responded that what Pare had done to the Union by filing the unfair labor practice charges against the Union he had done to him (Yuker) and, "until [Pare] changes that, this is the way it's going to be." One week later Pare is chosen for lay off. General Foreman Yuker who, days earlier, told Pare he was doing a nice job and he intended to keep him on the job but then on September 24, had a confrontation with Pare telling Pare that until he (Pare) cleared up his situation (charges) with the Union, relations between the two of them would be filled with animosity. These exchanges in September clearly refute the Company's contention General Foreman Yuker was simply following established protocol when he selected Pare for lay off on October 1, 2010.

(ALJD 12-13).

were four operators laid off: Chris Thurnau, Fred Higgins, William Larson, and Timothy Pare. Yuker testified about each. Thurnau was an operator laid off in around April when the 100-ton Grove Rough Terrain Crane he was working on for about a week went off rent. Yuker testified he received complaints from electricians working on the job that they did not feel comfortable working with Thurnau. (Tr. 214). Yuker also testified Thurnau came into work one day and stated that he did not feel capable of working that day. (Tr. 215). Finally, Yuker characterized Thurnau "as another book-smart operator who does not know what a crane is capable of." (Tr. 215).

Fred Higgins was an oiler who worked with Thurnau on the 100-ton Grove Rough Terrain Crane. Higgins, interestingly, was one of the other Local 139 members who filed Board charges against the Union regarding the operation of its referral service. Yuker testified he had heard from others that Higgins--who only worked for Yuker for about a week--was "lawsuit happy." (Tr. 215-216).

Larson was an oiler/operator laid off at the same time as Pare. Yuker disciplined Larson in early September for allegedly writing personal checks while standing inside the swing radius barrier of the crane he was oiling. This occurred shortly after another oiler, Dave Struely, was nearly killed for being inattentive while inside the swing radius barrier of his crane. Yuker confronted Larson about the incident, which Larson initially denied and then later admitted. Yuker stated that he selected Larson because of the seriousness of this offense (which counted as two strikes against Larson), and Larson's failure to fully "own-up" to the offense. (Tr. 139-140).

Taking this all into account, if you include Pare, who received no discipline and was a safe, productive, skilled operator, the four individuals fall into one of two



categories: individuals who had performance or disciplinary issues (Larson and Thurnau), or individuals who had no performance or disciplinary issues but who filed Board charges against Local 139 (Higgins and Pare).<sup>8</sup> In other words, URS's "established practice" does not support a finding of innocence, but rather supports a finding of guilt.

Finally, URS argues the ALJ erred because the Acting General Counsel and Pare both failed to establish who other than Pare should have been laid off. URS does not cite to any authority stating that such a showing is required, and the Acting General Counsel has found none. Regardless, at the time Yuker knew that Pare's crane was going to go off rent on September 16, URS had just requested that the Union refer an oiler to replace a discharged oiler (Struely), and the Union referred one (Kadlec). A week or so later, URS requested that the Union refer another oiler to replace a different discharged oiler (Heller), and the Union referred one (Bohn). Pare could have been retained over either of these other oilers, but he was not. Certainly, Yuker could have contacted his brother, the Union dispatcher, to notify him that Pare was likely going to be laid off, and that he wanted to keep him, rather than have another, new oiler sent over, if Yuker truly wanted to keep Pare.

#### IV. CONCLUSION

Based on the foregoing, the ALJ correctly concluded that Lewis Yuker made the decision to lay Pare off because he engaged in protected concerted and/or union


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<sup>8</sup> There was one other oiler with prior disciplinary issues. His name is James Junk. He was disciplined in September 2009 because, on several occasions, he was "found working outside and in contradiction to directions given by his supervisor." (Rej. G.C. Exh. 7). Despite this prior discipline, Junk was not selected for lay off on October 1. Instead, Yuker selected Pare, who had no prior discipline. The ALJ sustained URS's objection to the document as being too remote. URS could have selected Junk, instead of Pare, for layoff based upon his prior discipline.

activities, in violation of Section 8(a)(1) and (3) of the Act. The ALJ's findings and conclusions should be affirmed over URS's exceptions.

As a remedy, the Acting General Counsel seeks an appropriate notice to employees and an order that URS cease and desist from engaging in the above unlawful conduct, as well as an affirmative order requiring it to reinstate Timothy Pare to the same or equivalent position and make him whole for any lost wages or benefits resulting from his unlawful layoff, including compound interest. The Acting General Counsel seeks an order requiring reimbursement of amounts equal to the difference in taxes owed upon receipt of a lump-sum payment and taxes that would have been owed had there been no discrimination. In order for employees to be made whole, it is appropriate to seek reimbursement for amounts equal to the difference in taxes discriminatees owe upon receipt of a lump-sum payment and the taxes they would have owed had they not been the subject of discrimination. See *WEBCO Industries, Inc.*, 340 NLRB 10 (2003)(the Board determined this issue has to be fully litigated in the underlying unfair labor practice proceeding). The Acting General Counsel further seeks, as part of the remedy, that URS be required to submit the appropriate documentation to the Social Security Administration so that when backpay is paid, it will be allocated to the appropriate periods. Applying backpay paid for multiple years to a single year for Social Security purposes may have a dramatic effect on a discriminatee's ability to secure benefits and/or may lower benefits. For this reason, URS should be required to complete the appropriate paperwork to notify the SSA what periods to which the backpay should be allocated.

Respectfully submitted this 20<sup>th</sup> day of October, 2011.

A handwritten signature in cursive script, reading "Andrew S. Gollin". The signature is written in black ink and is positioned above a horizontal line.

Andrew S. Gollin, Esq.

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<sup>9</sup> In his decision, the ALJ did make one error, and that was in the spelling of Counsel for the Acting General Counsel's name. Counsel for Acting General Counsel's name is Andrew S. Gollin. The ALJ identified Counsel as Andrew S. Collin. Counsel respectfully requests that the Board correct this minor error in its decision.

URS Energy and Construction, Inc. ("URS")  
Case 30-CA-18775

Copies of General Counsel's Answering Brief to Exceptions have been sent October 20<sup>th</sup>, 2011 by regular mail, to the following parties of record:

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